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CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff.	)	
v.	)	CR. NO. 01-150-A
	)	
JAY E. LENTZ,	)	
	)	
Defendant.	)	

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MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Jay Lentz's Motion to Set Aside Jury's Verdict and Request for Evidentiary Hearing. In this motion, the Defendant requests a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Defendant Jay Lentz was charged with kidnapping resulting in death based upon the disappearance of his ex-wife Doris Lentz. The issues before the Court are (1) whether the jury considered unadmitted evidence; and (2) whether the jury's consideration of the unadmitted evidence unfairly prejudiced the Defendant such that he is entitled to a new trial. This case came before the Court for trial on June 6, 2003. The jury returned a verdict of guilty on July 7, 2003. On July 22, 2003, this Court entered a Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Thereafter on July 25, 2003, the Government appealed the verdict of acquittal to the Fourth Circuit Court of Appeals. The disposition of the instant motion is conditional upon the

appellate court's decision on the judgment of acquittal. The Court concludes that inadmissible evidence, which had been excluded in a pretrial ruling, was intentionally supplied to the jury by the Government. The evidence demonstrates: (1) that two day planners, which had been excluded from evidence, were intentionally submitted to the jury by the Government; (2) that this submission was not benign because it violated the Defendant's Sixth Amendment right to confrontation and prevented him from receiving a fair trial; and (3) that the Government fails to meet its burden to prove that the submission was harmless because the evidence bolstered the Government's arguments and completely destroyed the Defendant's credibility and therefore, his case. Accordingly, the Court concludes that the Defendant Jay Lentz is entitled to a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

I. BACKGROUND

The Defendant argues that he is entitled to a new a trial because unfairly prejudicial evidence, not introduced at trial, came before the jury. The evidence in question is two day planners belonging to Ms. Lentz. The first is marked as Government's Exhibit 548, which is a brown leather day planner ("brown day planner"). The second is an unmarked black pocket sized day planner ("black day planner") from the Wisconsin Paralyzed Veterans of America. These day planners contain entries that suggest Ms. Lentz used these planners to list appointments and as diaries to record events, conversations, and notes.

The Court admitted four photocopied pages from the brown day planner and two photocopied pages from the black day planner into evidence. These pages were admissible to show Ms. Lentz's state of mind regarding her daughter's return from a visit to Indiana. Fed. R. Evid. 803(3). All other evidence in the two day planners was deemed inadmissible by the Court as irrelevant and unduly prejudicial. The inadmissible evidence included: (1) notes concerning harassing/threatening telephone calls; (2) notes concerning a protective order; (3) notes relating to conversations with Julia Lentz; (4) telephone numbers for an Arlington County Police Detective and a domestic violence support group; and (5) a picture of Julia. Furthermore, the Court determined that the statements in the planners were inadmissible hearsay because they did not fall within any of the twenty-three exceptions to the rule against hearsay. The Defendant argues that this inadmissible evidence, considered by the jury, was so prejudicial that he could not have received a fair trial. Notably, the evidence against the Defendant was almost entirely circumstantial. Given the length of the jury's deliberations, the fact that the jury indicated that it were deadlocked, and the fact that seven jurors indicated that they harbored residual doubt in the penalty phase, there is no question that reaching a verdict was extremely difficult for the jury. Under these circumstances, the Defendant argues that the Government cannot meet its burden to prove that the extraneous evidence was harmless and did not influence the jury's verdict.

The Government, at first, denied that extraneous evidence was submitted to the jury; however, at the beginning of the evidentiary hearing, the Government acknowledged that the black and brown day planners had gone back to the jury. The Government argues that the introduction of Ms. Lentz's day planners into the jury room was simply harmless error. Moreover, the Government contends that the unadmitted evidence submitted to the jury was cumulative of evidence already admitted and irrelevant; therefore, it does not warrant the grant of a new trial.

II. PROCEDURAL HISTORY

The Defendant submitted the instant motion to set aside the jury's verdict and request for an evidentiary hearing on July 25, 2003. At this time, the Court became aware of allegations that the jury's verdict may have been influenced by the submission of unadmitted evidence to the jury. The Court decided to conduct an evidentiary hearing to ascertain (1) whether extraneous evidence was presented to the jury, (2) who was responsible for the error, and (3) and whether it was necessary to grant the Defendant a new trial. The Government objected to the trial judge as arbiter of the evidentiary hearing and, accordingly, filed a motion to recuse. Before the Court could rule on the motion, the Government filed a Petition for Writ of Mandamus in the United States Court of Appeals for the Fourth Circuit, seeking a ruling that would prevent the trial judge from presiding over the evidentiary hearing. Subsequently, the Court denied the motion to recuse. Additionally,

the Fourth Circuit Court of Appeals denied the Government's Petition for Writ of Mandamus.

Thereafter, on November 4 and 5, 2003, the Court conducted an evidentiary hearing. The Court issued subpoenas for four jurors, who had submitted statements in connection with the Defendant's motion to set aside the jury's verdict. The Court did not permit the remaining jurors to testify because the testimony of the four jurors[1] that came forward was sufficient to determine whether any unfairly prejudicial information came before the jury, and because any additional testimony regarding what occurred in the jury room would be barred by Federal Rule of Evidence 606(b).[2] The Court had addressed the issue of competent evidence pursuant to Rule 606(b) with regard to the testifying jurors in its Order dated August 26, 2003. In that Order, the Court provided that it would only consider testimony from the jurors related to (1) whether the jury saw the day planners in question, and (2) the timing of when the day planners appeared in the jury room. Additionally, the Court heard testimony from the attorneys for both the Government and the

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[1] Juror Number 1 submitted an affidavit to the Court, but did not appear in response to the subpoena.

[2] Rule 606(b) provides in pertinent part that: A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Fed. R. Evid. 606(b).

defense, as well as the Courtroom Deputy Clerk and the Court Security Officer.

III. TESTIMONY

A. THE JURORS

Juror Number 51, the foreperson of the jury, testified that she reviewed Ms. Lentz's brown day planner in its entirety in the jury deliberation room. Also, she recalled Assistant United States Attorney Steven Mellin's closing arguments, which drew the jury's attention to the unadmitted black and brown day planners. She noted that she saw photocopied pages of the black day planner - Defendant's Exhibit 3 - in the jury room. Juror Number 51 remembered reviewing the day planners after the jury submitted the note to the Court indicating that it was deadlocked. Furthermore, she stated that the jury considered the day planners as a part of their discussion of the case.

Juror Number 51 also testified that after the verdict was returned, she consulted with her cousin, an attorney, and informed him about the presence of the day planners in the jury room. Juror Number 51 believed that the day planners were not admitted into evidence. She also informed her attorney cousin that prior to deliberations she inadvertently saw a television news report that stated that the Defendant had confessed to the crime. The Court notes that Mr. Lentz has never given a confession in this case.

When questioned by counsel and the Court about the issue of exposure to the television newscast, Juror Number 51 testified that

she was not actually sure what she saw displayed on the television screen, but whatever she saw left her with the impression that Mr. Lentz had confessed prior to trial. Juror Number 51 testified that she kept her ideas of Mr. Lentz's alleged confession out of her mind during the deliberations. She did not report this newscast to the Court. Juror Number 51's actions were in clear violation of the Court's instructions to the jury, despite having been questioned repeatedly by the Court during the trial about outside influences, as well as having received a daily admonishment by the Court not to watch media reports about the case.

Juror Number 56 testified that after the jury returned the verdict, he called defense counsel Mr. Frank Salvato to give him some feedback in connection with the defense's presentation of the case.[3] Juror Number 56 testified that he is a teacher at the Federal Aviation Administration, and based upon his experience, he thinks it is helpful to receive feedback after a presentation. As a part of the discussion about the trial, Juror Number 56 reported to Mr. Salvato that two day planners that he thought were not admitted into evidence were in the jury room. He identified Ms. Lentz's black and brown day planners as the items that were present in the jury room. Juror Number 56 testified that all jurors read both day planners. Additionally, Juror Number 56 indicated that he was certain that the day planners were in the jury room at the

[3] Defense counsel's contact with jurors was not a violation of Local Rule 83.5 because the jurors initiated contact with defense counsel. E.D. Va. R. 83.5.

beginning of days two and three of the jury deliberations.

Finally, Juror Number 15 testified that he called Mr. Salvato to let him know what he thought about the trial. Juror Number 15 spoke with Juror Number 56 prior to calling Mr. Salvato. Juror Number 15 acknowledged observing the two day planners in the jury deliberation room. Juror Number 15 identified the black and brown day planners and acknowledged that all of the jurors looked at the day planners. Juror Number 15 also recalled substantive jury discussion about the day planners during days four and five of the deliberations.

B. THE COURTROOM DEPUTY CLERK

Ms. Jo Solomon, the courtroom deputy clerk, testified that she was responsible for the evidence in *United States v. Lentz*. Ms. Solomon did not recall the brown day planner, or the unmarked black day planner being admitted into evidence. Ms. Solomon's notes do not reflect that these items were admitted into evidence. However, Ms. Solomon's notes reflect that four photocopied pages from the brown day planner and two photocopied pages from the black day planner, Defendant's exhibit 3, were admitted into evidence.

Ms. Solomon's testimony reflected her memory of how the evidence was prepared for submission to the jury. Ms. Solomon checked the Clerk's Exhibit List with counsel for both sides, at the Defendant's table and at the Government's table. In her check with counsel, Ms. Solomon went over her list of the items admitted into evidence and secured agreement from counsel that the items being separated for the jury were actually admitted into evidence.

Ms. Solomon stated that she went over each item of evidence with Mr. Michael Chellis, the government's law clerk, at the front table. Ms. Solomon testified that the government's documentary evidence was in notebooks on the front table. According to Ms. Solomon, Mr. Chellis, Mr. Mellin, Assistant United States Attorney Patricia Haynes, FBI Special Agent Garrett, and Sgt. Coale of the Arlington County Police Department were all in the courtroom at the time that this action took place.

Ms. Solomon told Mr. Chellis that the items admitted into evidence would be sent to the jury room. She discussed with Mr. Chellis that only four photocopied pages of the brown day planner were admitted into evidence. The brown day planner, in its entirety was not admitted into evidence. After Ms. Solomon, Mr. Chellis, and defense counsel reviewed the various exhibits submitted into evidence, Ms. Solomon did not reexamine the evidence before it was turned over to Mr. William Scruggs, the courtroom security officer.

Ms. Solomon was called to testify a second time as a part of the Government's case. At this time, she testified that the Clerk's exhibit list she had in court at the evidentiary hearing was a revised Clerk's exhibit list and not the original list recorded during the trial. Ms. Solomon acknowledged that after making a revised Clerk's exhibit list she discarded the original exhibit list. Ms. Solomon said that she assumed that the revised Clerk's exhibit list was accurate, but she concluded in her testimony that the revised Clerk's exhibit list was not accurate.

Ms. Solomon admitted that she erred by discarding the original Clerk's exhibit list, which resulted in several inconsistencies. For instance, Government's Exhibit 450 is blood evidence that was submitted to the jury; however, Ms. Solomon's revised exhibit list reflected that these items were not admitted into evidence. Mr. Chellis testified that the Government and the defense agreed to admit the blood evidence, Government's Exhibit 450, and to allow it to be placed on the evidence cart. The parties did not inform Ms. Solomon that they had decided to admit this evidence. Furthermore, Ms. Solomon's revised exhibit list was inaccurate with respect to Ms. Lentz's two car seats. The car seats, Government's Exhibit 519 and 522, were noted on the revised exhibit list marked as "used", but there was no indication that the car seats were admitted into evidence. All parties agreed that Ms. Lentz's car seats, were not only used but admitted into evidence during the trial. Moreover, two experts testified about scientific evidence concerning the car seats.

Ms. Solomon also acknowledged that after the trial the Government returned a CD to her, which contained evidence that was presented at trial. The Government stated that the CD was still in the CD Player at the end of jury deliberations, whereas it should have been returned directly to the Clerk's office.

C. THE COURT SECURITY OFFICER

Mr. William Scruggs, the court security officer assigned to this case, acknowledged that he took exhibits to the jury. Mr. Scruggs testified that Ms. Solomon checked her exhibit list with

the lawyers and gathered the evidence to be taken to the jury. After Ms. Solomon and the lawyers separated the evidence, it was then turned over to him for delivery to the jury room. Mr. Scruggs recalls that prior to loading a cart to carry the evidence, he addressed counsel for the Government and defense and asked specifically if those items were the evidence. Mr. Scruggs said that after being told by lawyers for both sides that it was appropriate to take the evidence to the jury room, he put the evidence in a cart and took it to the jury. Mr. Scruggs testified that there was evidence in notebook binders at the front table, and physical evidence at the back table. He was told that all the items on the right hand side of the back table were to go back to the jury. Mr. Scruggs recalls seeing the brown day planner on the table with the evidence for the jury. Mr. Scruggs testified that Special Agent Brad Garrett, Mr. Chellis, and Sgt. Coale offered to help him put these items on the cart.

D. MS. JUDY CLARK

Ms. Judy Clark, a member of the defense team, testified that she remembers Ms. Patricia Haynes offering the brown day planner into evidence. Ms. Clark objected to the exhibit and the Court sustained the objection. In response to her objection, four photocopied pages from the brown day planner were admitted into evidence.[4]

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[4] This dialogue is found in Defendant's Exhibit 6, produced for this evidentiary hearing. This exhibit is a trial transcript of June 4, 2003.

Ms. Clark testified that while the evidence was being bundled for the jury, she had a discussion with Mr. Mellin. This conversation took place, according to Ms. Clark's testimony, at the defense's back table. Ms. Clark recalls that Mr. Mellin had the brown day planner and the photocopied pages from the planner in his hand. He said to Ms. Clark something to the effect of, "Do you mind if we put the two pages in the binder so that the jury will know that this excerpt is from the day planner?" Ms. Clark then asked her co-counsel, Mr. Michael Lieberman, for guidance. Mr. Lieberman answered by saying that using the leather cover of the exhibit was fine, as long as Mr. Mellin removed the unadmitted pages of the planner.

Ms. Clark testified that she did not recall seeing the black day planner in court because it was not used in court. Furthermore, she stated that the black day planner was never in her possession. However, she had in her possession photocopied pages of the black day planner, two of which were offered into evidence as Defendant's Exhibit Three. These two pages were offered to show Ms. Lentz's state of mind with regard to her daughter's return from her visit with her grandparents in Indiana. The dates in the black day planner reflected dates that were different from those in the brown day planner, which supported the Government's position that Julia was not expected to come home on the day Ms. Lentz disappeared.

After allegations of jury misconduct arose, Ms. Clark went to the office of the Clerk of Court. There she found the black day

planner and the brown day planner in a box of evidence, which contained other evidence that properly was submitted to the jury. Ms. Clark testified that these items had not been admitted into evidence and were not present when she reviewed the evidence with Ms. Solomon prior to the submission of the evidence to the jury.

Ms. Clark was not sure if she saw the cart of evidence loaded for transport into the jury room. She said she was present when the court security officer, Mr. Scruggs, asked the lawyers whether the cart was prepared to go the jury. Furthermore, Ms. Clark remembered that during this time, Mr. Lieberman went over to the cart and looked at the evidence. He did not attempt to review all of the items again, because both sides previously had checked the evidence line by line with the courtroom deputy clerk, Ms. Solomon. Then, Mr. Scruggs took the loaded cart back to the jury.

Ms. Clark was clear that she had a specific conversation with Mr. Mellin about using the brown leather folder with the photocopied pages of the brown day planner inside. Ms. Clark was also certain that Mr. Lieberman told both herself and Mr. Mellin that the government could use the leather holder "as long as you take the rest of the content out." Ms. Clark had no recollection of informing Ms. Solomon that the day planner cover was to be emptied and the four pages were to be inserted. Ms. Clark noted that neither she, Mr. Salvato, nor Mr. Lieberman reexamined the day planner to see if Mr. Mellin had actually removed the contents of the brown day planner. She said that she did not observe Mr. Mellin or any member of the prosecution team place the day planner

on the cart. Ms. Clark also said that she did not reexamine the brown day planner because she trusted Mr. Mellin, as an officer of the court, to keep his word.

E. ASSISTANT FEDERAL PUBLIC DEFENDER MICHAEL LIEBERMAN

Mr. Michael Lieberman's testimony was in agreement with Ms. Clark's. He also recalled that there was a discussion with Ms. Clark and Mr. Mellin about the brown day planner. Mr. Mellin was near the podium when he asked Ms. Clark if he could insert the photocopies of two pages of calendar dates in the brown day planner folder. Mr. Lieberman told Mr. Mellin that this action was fine, as long as he took all of the documents out of the folder except for the admitted evidence. Mr. Lieberman said that he did not verify that the unadmitted pages had been removed from the brown leather folder because, despite the obvious adversary nature of a court case, he felt that he could trust an attorney to keep his word.

Mr. Lieberman recalled that the defense was in possession of photocopies of the black pocket day planner and that they never had possession of the original black day planner. Mr. Lieberman remembered that the Government did not try to offer the original black day planner into evidence. He also had no recollection of seeing the brown day planner or the black day planner on the evidence cart. However, Mr. Lieberman looked at the loaded cart before it went to the jury room, but did not go through each piece of evidence individually. Finally, Mr. Lieberman testified that he saw Mr. Chellis, Sgt. Coale, and Special Agent Garrett by the back

table.

F. MR. FRANK SALVATO

Mr. Frank Salvato, co-defense counsel, testified that he discovered that there were grounds for a motion for a new trial after talking with jurors 51, 56, and 15. Each of these jurors told Mr. Salvato that the jury discussed Ms. Doris Lentz's two day planners, but that they had all suspected that the day planners had been sent to the jury room in error. However, they decided that because the day planners were among the exhibits sent to the jury it was proper to review them during jury deliberations. Upon discovering that the jurors considered unadmitted evidence, Mr. Salvato and the rest of the defense team filed the instant motion.

Mr. Salvato was present in the courtroom when the evidence was prepared for the jury. Mr. Salvato recalled reviewing the exhibits with Ms. Solomon, the deputy courtroom clerk. Mr. Salvato said that the defense exhibits were placed in a folder. Then, he offered the folder to Special Agent Garrett to review so that he could check the exhibits again, despite the fact that Ms. Solomon had already reviewed the folder and its contents. However, Special Agent Garrett declined Mr. Salvato's offer.

Mr. Salvato observed and heard the conversation between Mr. Mellin and Ms. Clark about the brown day planner. He testified that the lead prosecutor, Mr. Mellin, asked Ms. Clark for permission to place the photocopied pages that were admitted into evidence, within the brown leather-bound folder. He remembered that Ms. Clark conferred with Mr. Lieberman, and he said that it

was, "Okay, as long as he [Mr. Mellin] takes everything out!" In response, Mr. Mellin said "Fine." Mr. Mellin then walked away with the brown day planner in his hands.

Mr. Salvato recalled that the two day planners were in the exclusive possession of the Government and never in the hands of the defense. He also testified that the first time he saw the brown day planner was during the trial. He did not see the brown day planner again until he and Mr. Lieberman went to the clerk's office to review the evidence after the trial. While reviewing the evidence, Mr. Salvato saw the original black day planner, which was never admitted into evidence, among evidence that had been submitted to the jury. Mr. Salvato also saw the brown day planner with all of its contents intact, in the box of evidence.

G. MR. TYRONE BOWIE

Mr. Tyrone Bowie is an information technology specialist for the Office of the United States Attorney. His testimony concerned his preparation of audio clips of telephone calls and messages between Jay and Doris Lentz onto CD-format, as well as his observations in court. Mr. Bowie testified that he did not see the brown day planner on the day the evidence was prepared for the jury. Mr. Bowie did, however, recall seeing the brown day planner during closing arguments when Mr. Mellin displayed it to make a point. Mr. Bowie testified that Mr. Mellin placed the brown day planner on the front counsel's table during closing arguments the day before the evidence was submitted to the jury. Mr. Bowie did not see the black day planner in the courtroom. Mr. Bowie stated

that he prepared a revised CD of audio clips that had been admitted to evidence at Mr. Mellin's direction so that what was submitted to the jury would only be the audio clips that were admitted into evidence. The original CD prepared for trial had a number of conversations that were not admitted by the Court. Mr. Bowie was responsible for preparing the new CD with only the admitted conversations and messages. Mr. Bowie testified that he prepared the revised audio clip CD the night before the evidence was to be submitted to the jury.

H. FBI SPECIAL AGENT BRADLEY GARRETT

FBI Special Agent Bradley Garrett testified that he was present in the courtroom the day the evidence was prepared for the jury. Mr. Chellis gave Special Agent Garrett a list of exhibits and assigned him the task of removing documents that had not been admitted from the notebooks containing the exhibits. Special Agent Garrett was assisted by Sgt. John Coale.

Special Agent Garrett testified that during the trial he saw the brown day planner at the Government's back table. However, Special Agent Garrett did not see this item on counsel's table on the day the evidence was submitted to the jury. He also denied having any discussions with Mr. Mellin about the brown day planner.

Special Agent Garrett testified that he was not familiar with the contents of the black day planner, or whether it was admitted into evidence. He said he was not present when Ms. Solomon checked the exhibits with the lawyers, and did not recall seeing the black day planner in the courtroom. Special Agent Garrett said that he

and Sgt. Coale left the courtroom after they helped Mr. Chellis with the Government's exhibits. Finally, Special Agent Garrett denied offering to help Mr. Scruggs load the evidence into the cart for the jury.

I. SERGEANT JOHN COALE

Sgt. John Coale of the Arlington County Police Department testified that he assisted Special Agent Garrett with removing unadmitted documents and photographs in the Government's exhibit notebooks. Sgt. Coale helped Special Agent Garrett make a stack of items. They then placed these items on the back table, along with the other unadmitted evidence. Also, Sgt. Coale said that he helped bring two car seats up to the jury door. Next, he helped isolate the exhibits. Although, Sgt. Coale did not recall offering to help Mr. Scruggs load the cart, he did not deny that he helped Mr. Scruggs load it.

Sgt. Coale recalled seeing the brown day planner during Mr. Mellin's closing arguments. Although Sgt. Coale was not aware of which exhibits had been admitted during the trial, he knew that the Government planned to admit the brown day planner. He knew this because he helped the prosecutors prepare for trial by helping label exhibits. Sgt. Coale said that all of the physical evidence that the Government planned to admit and had not planned to admit, was kept in a room at the United States Attorney's office. This room was across from Mr. Mellin's office. Sgt. Coale testified that when the prosecutors came to court, they brought with them marked exhibits, as well as items that the Government thought might

be admitted into evidence. These items were put in the Government's witness room.

J. ASSISTANT UNITED STATES ATTORNEY STEVEN MELLIN

Mr. Steven Mellin, the Government's lead counsel, testified that he came to court with Ms. Patricia Haynes around 9:30 a.m. on the day the evidence was bundled for the jury. When he arrived, Special Agent Garrett, Sgt. Coale, and Mr. Chellis were already present. Mr. Mellin recalled having a conversation with Ms. Clark, about the brown day planner. However, Mr. Mellin did not recall asking Ms. Clark if the defense would mind if the brown leather day planner went back to the jury. He stated that the brown day planner was in the courtroom.

Mr. Mellin did not recall the black day planner being in the courtroom on the day the evidence was separated. He testified that copies of the black day planner were offered into evidence by the Defendant. He said that he was in the courtroom when the evidence was being assembled and that there were several notebooks of documents being separated.

Mr. Mellin testified that he was concerned about three things as the evidence was being gathered. First, he was concerned about ensuring that a new CD of audio clips containing telephone calls and messages between Jay and Doris Lentz was properly prepared for the jury such that there were no audio clips of calls that had not been admitted into evidence. Second, he wanted to make sure that a photograph of Doris Lentz's apartment, which showed a domestic violence survivor's handbook, was not presented to the jury because

it had not been admitted into evidence. Third, Mr. Mellin wanted to make certain that the domestic violence survivor's handbook was not inadvertently sent into the jury room. He told Mr. Chellis about these three things and directed him to make sure that these items were not bundled with the items to be sent to the jury. After telling Mr. Chellis his concerns, Mr. Mellin stated that he left the courtroom to check on Mr. Bowie, who was preparing the revised CD's. Mr. Mellin was not involved with the actual separation of the evidence and he did not recall who sorted or prepared the government's evidence for the jury.

Mr. Mellin also did not recall what happened to the brown day planner. Mr. Mellin testified that he had no independent recollection of using the brown day planner during his closing argument, except that he had seen a drawing of himself holding the brown day planner on the news. He also denied having any recollection of engaging in a conversation with Ms. Clark and Mr. Lieberman about requesting to use the brown leather bound folder. He did not deny that a conversation about this evidence with defense counsel took place. Mr. Mellin denied placing the brown day planner and the black day planner on the evidence cart.

Mr. Mellin said he saw the black planner on the Saturday before closing arguments. He said that at that time, he asked Mr. Chellis to photocopy pages of the black day planner so that the Government could respond to Defendant's arguments regarding Ms. Lentz's belief about when her daughter would return from Indiana. However, Mr. Mellin did not recall how the black day planner ended

up in the courtroom. He also said that he is certain that he did not remove any contents from the brown day planner nor did he place the brown day planner on the cart.

K. MR. MICHAEL CHELLIS

Mr. Michael Chellis, an attorney and law clerk for the Office of the United States Attorney, testified that he was responsible for managing the Government's exhibits. Mr. Chellis was also responsible for managing the placement of digitized evidence on CD-ROM format for the Government's use during trial. Mr. Chellis recalled that the brown day planner was used during trial. Mr. Chellis also said that he talked with Ms. Clark about the brown day planner on the day the evidence was bundled for the jury. Also, he photocopied several pages of the brown day planner and placed them in a plastic sleeve.

In performing his duties, Mr. Chellis recalled meeting with Ms. Solomon to review the Clerk's list of evidence. Mr. Chellis remembered that he examined the originals and copies of admitted exhibits. He had questions on the status of several items that he discussed with Ms. Clark and Ms. Solomon. Mr. Chellis remembered that Ms. Clark and Ms. Solomon agreed that certain documents he identified were admitted into evidence. Additionally, Mr. Chellis spoke with Ms. Clark about the brown day planner, offering to allow her to compare the photocopied pages with the original brown day planner. Mr. Chellis did not recall discussing the brown day planner with Mr. Mellin. Mr. Chellis recalled that he placed the brown day planner on the back counsel table. He was aware that the

whole day planner, in its entirety was not admitted into evidence. Mr. Chellis did, however, recall talking with Mr. Mellin about the preparation of the revised audio clip CD's. Mr. Chellis testified that when he received the revised CD's, he presented them to Ms. Clark and asked her if she wanted to see and hear them. Ms. Clark then approved the revised CD's.

Mr. Chellis did not load the evidence cart. Mr. Chellis said that he offered to assist Mr. Scruggs with the evidence to be taken to the jury. Specifically, he offered to help Mr. Scruggs with two large car seats, which were admitted into evidence. Mr. Scruggs declined this offer of help. Mr. Chellis did not recall either the black or the brown day planner being set aside with the evidence to be sent back to the jury.[5]

Mr. Chellis testified that prior to closing arguments Mr. Mellin asked him for a copy of the pages from the black day planner that the defense offered into evidence. Mr. Chellis said he obtained the original black day planner and made a copy of the requested pages for Mr. Mellin. Mr. Chellis testified that he placed the original black day planner and copies of selected pages on Mr. Mellin's chair in the United States Attorney's office. Mr. Chellis testified that the next time he saw the black day planner

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[5] Mr. Chellis testified that a Government CD player, which had been provided to the jury for listening to the CD's, was returned to the Government. Inside this CD player was a CD that had been admitted into evidence and inadvertently returned to the Government. Mr. Chellis informed Mr. DiGregory, a supervisor in the United States Attorney's Office, and Mr. DiGregory contacted Ms. Solomon, and returned this item to the Clerk's office.

was in the courtroom with other materials at the Government's counsel table, where Mr. Mellin usually sat. Mr. Chellis noted that the black day planner was a part of the Government's evidence, however, it was not offered into evidence.

Mr. Chellis also testified that he asked Special Agent Garrett and Sgt. Coale to separate the notebooks. Mr. Chellis had no recollection of either Sgt. Coale or Special Agent Garrett telling him that they had finished separating the evidence. Mr. Chellis also did not check the evidence that the officers were supposed to separate before putting it aside for the jury. Furthermore, he testified that the brown day planner was on the back table on the podium side. Additionally, Mr. Chellis decided to bring the brown day planner to court because he thought that the lawyers wanted to examine it again as it had been an issue before trial.

L. ASSISTANT UNITED STATES ATTORNEY PATRICIA HAYNES

Ms. Patricia Haynes, co-counsel for the Government, testified that she offered the brown day planner into evidence. Ms. Haynes testified that in her view, despite the transcript reference to the contrary, she only intended to offer a portion of the brown day planner.[6] She said, in her opinion, only two pages of the brown day planner were relevant and admissible. However, the trial transcript reference suggests that Ms. Haynes intended to offer the remainder of the brown day planner later in the Government's case. Ms. Haynes recalled seeing a copy of pages from the brown day

[6] *See* Nov. 5, 2003 transcript of the evidentiary hearing at 77.

planner when the evidence was assembled for the jury.

Ms. Haynes had no specific recollection of assembling or handling the evidence. She testified that she did not take the lead in assembling the evidence. Ms. Haynes did not recall if Ms. Solomon told counsel that evidence could be admitted to the jury that had not been admitted into evidence by the judge. Ms. Haynes, however, recalled that Ms. Solomon told the lawyers if their records reflected that they made reference to evidence in trial and this evidence was marked and testified to, then it would be considered admitted.

Ms. Haynes testified that she saw the court security officer, Mr. Scruggs, in front of the Government counsel table after the evidence had been separated by counsel and reviewed with Ms. Solomon. Ms. Haynes recalled that Mr. Scruggs asked the lawyers if all of the evidence was ready for the jury. She then looked toward Mr. Mellin, asked if the Government's evidence was indeed ready, and he responded in the affirmative.

Ms. Haynes did not recall hearing any conversation between Ms. Clark and Mr. Mellin about the brown day planner. She did recall that Mr. Mellin used the brown day planner during closing arguments. Ms. Haynes had no idea how the black or brown day planner reached the jury room with the properly admitted evidence.

Finally, the Court noted during the evidentiary hearing that Ms. Haynes filed a brief with this Court, Defense exhibit 2C, wherein she wrote, "both day planners were in the courtroom on the Government's counsel table." Ms. Haynes was questioned about this

statement and she said that this information came from Mr. Mellin. According to Ms. Haynes, Mr. Mellin told her that the prosecution team denied any involvement with the mismanagement of the evidence.

IV. FINDINGS OF FACT

The Court, after hearing the evidence, considering the demeanor of the witnesses, and weighing the credibility of the witnesses, renders the following findings of fact.

A. THE TRIAL JUDGE

There has been considerable focus in these evidentiary hearings upon who is ultimately responsible for the evidence in a criminal trial. The trial judge is ultimately responsible for everything that happens in his courtroom. The trial judge's responsibility is to rule on the admission or exclusion of evidence. The trial judge must rule clearly so that the parties are aware of what evidence conforms to the law.

In this case, as a trial judge, I take responsibility for my role in this perplexing dilemma. Before the trial started, I directed the attorneys to present the critical evidence to the Court, and to each other so that I could give deliberate thought and reflection to the admissibility of evidence. The parties briefed the evidentiary issues, including the issue of the admissibility of Doris Lentz's day planners. The parties presented these briefs to the Court well in advance of trial. I spent many hours poring over the briefs as well as the applicable case law. I ultimately issued a seventy-six page definitive opinion where I

excluded Doris Lentz's day planners. This evidence was inadmissible because the admission of Doris Lentz's day planners would violate Mr. Lentz's Sixth Amendment right to confrontation. I also excluded this evidence because it is classic hearsay that does not fall within any of the twenty-three exceptions to the hearsay rule. The Government filed a motion to reconsider my ruling. I reviewed these issues again and denied the motion to reconsider.

While the Court was engaged in capital case jury selection, the Government exercised its right to interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. Following a full briefing and argument, the Court of Appeals affirmed my evidentiary ruling. At trial, the Government presented evidence and attempted to persuade me to revise my rulings on this evidence. Ms. Haynes sought to admit the brown day planner in full despite the clear definitive ruling excluding the full day planner. Both the prosecution and defense teams were aware that the full brown day planner was not admitted into evidence. Mr. Chellis, the Government's law clerk, was also aware of the Court's ruling. It has not been my practice in the past to review the hundreds of exhibits admitted or excluded in a trial when the evidence is being prepared for the jury. This is my practice because as a judge I depend upon the lawyers and the clerk to ensure that only admitted evidence goes to the jury. To that end, I direct the clerk to assemble the evidence for the jury with the lawyers, and any disputes over what items were admitted are to be presented to me

for a ruling before the evidence is taken to the jury.

B. THE COURT SECURITY OFFICER

Mr. Scruggs did not cause the extraneous evidence to go to the jury. All the lawyers, and Mr. Chellis, testified that Mr. Scruggs asked the lawyers whether the items were ready for submission to the jury prior to loading the evidence cart for the jury. After the lawyers told Mr. Scruggs that the evidence was ready for the jury, Mr. Scruggs took the evidence cart to the jury.

Mr. Scruggs's testimony, however, is in conflict with the testimony of Mr. Chellis and Special Agent Garrett. Mr. Scruggs testified that Special Agent Garrett, Mr. Chellis, and Sgt. Coale helped him load the cart. Sgt. Coale testified that he brought Ms. Lentz's car seats to the jury room door. Mr. Chellis testified that he offered to help Mr. Scruggs, however Mr. Scruggs declined his offer. The testimony of Sgt. Coale supports the Court's finding that Sgt. Coale helped Mr. Scruggs by bringing Ms. Lentz's car seats to the door outside the jury room. Despite the inconsistencies, Mr. Scruggs cannot be held accountable for the submission of the unadmitted black and brown day planners to the jury because his responsibility was limited to the transport of evidence and not the removal of unadmitted evidence from the boxes containing evidence for the jury.

C. THE COURTROOM DEPUTY CLERK

The Court finds that the courtroom deputy clerk, Ms. Solomon, made some errors with respect to the sorting of exhibits; however,

she was not responsible for sending the extraneous evidence to the jury. The error of discarding the original exhibit list is significant because the unofficial clerk's exhibit list does not accurately reflect the exhibits that were identified and used at trial. For instance, the unofficial clerk's exhibit list does not reflect that the blood evidence, Government Exhibit 540, was properly identified and used at trial. Furthermore, the clerk's exhibit list does not reflect that Ms. Lentz's car seats, Government Exhibits 519 and 522, were admitted into evidence. In fact, these items were critical pieces of admitted evidence.

In spite of these errors, Ms. Solomon cannot be held responsible for the submission of the extraneous evidence to the jury because (1) the attorneys kept their own exhibit lists, which reflected that the black and brown day planners were not admitted into evidence, (2) Ms. Solomon's exhibit list was accurate with respect to the black and brown day planners because it reflected the fact that only the photocopied pages, and not the original planners, were admitted into evidence, and (3) Ms. Solomon never had physical possession of the black and brown day planners during the trial. Ms. Solomon properly reviewed the exhibits and her exhibit list with the lawyers before the evidence was taken to the jury. Throughout the trial, the admitted evidence was in the physical possession of the lawyers for use when they questioned the witnesses. Furthermore, Mr. Mellin, not Ms. Solomon, was the last person to be seen with physical possession of the day planners before the evidence was submitted to the jury. Accordingly, Ms.

Solomon is not accountable for the submission of the black and brown day planners to the jury.

D. ASSISTANT UNITED STATES ATTORNEY PATRICIA HAYNES

The Court finds no reason to question the credibility of Ms. Haynes. Ms. Haynes, co-counsel for the Government, did not take responsibility for the black and brown day planners on the day the evidence was submitted to the jury. When there were questions regarding the admission of evidence, Ms. Haynes deferred to lead counsel, Mr. Mellin. Furthermore, there is no evidence before the Court to suggest that she handled the planners on the day the evidence was submitted. Accordingly, the Court does not hold Ms. Haynes accountable for the submission of the day planners to the jury.

E. THE BLACK DAY PLANNER: AUSA STEVEN MELLIN

The Court has traced the path of the black day planner using the testimony of the witnesses and finds that Mr. Mellin, the lead prosecutor, is responsible for the intentional submission of the black day planner, excluded evidence, to the jury. Mr. Mellin's demeanor and testimony demonstrate that he was being less than candid with the Court with respect to the black day planner for the following three reasons. First, Mr. Mellin seemed to be unaware of the location of the black day planner during the trial on the day of the evidentiary hearing, but the Government averred, at his suggestion, in its supplemental response to the instant motion that "both day planners were in the courtroom on the Government's

counsel table." Gov't's Supplemental Response to Def.'s Mot. to Set Aside the Jury Verdict at 2. Second, Mr. Mellin was the last person known to have handled the black day planner, but he failed to recall its appearance in court on the day the evidence went to the jury. Third, Mr. Mellin was acutely aware of the importance of the unadmitted black day planner because he directed the jury's attention to it in his closing argument, but he appeared to diminish its importance on the day of the hearing. The above demonstrated lack of credibility leads this Court to decide that Mr. Mellin must be held accountable for the submission of the black day planner.

It is significant that Mr. Mellin testified that he was unaware of whether the black day planner was in the courtroom on the day the evidence was sorted. This statement is notable, because in the Government's Supplemental Response to Defendant's Motion to Set Aside the Jury Verdict (hereinafter, "Supplemental Response"), the Government's position is that "everyone in the courtroom had access to both day planners as the day planners were in court on Government counsel's table, to be available to all attorneys in this case." Gov't's Supplemental Response to Def.'s Mot. to Set Aside the Jury Verdict at 2. When questioned about this statement, Ms. Haynes testified that she wrote the Government's Supplemental Response based upon what Mr. Mellin said happened on that day.

Furthermore, it is apparent from the testimony that Mr. Mellin was the last person known to be in possession of the black day

planner. Before closing arguments, Mr. Chellis said that he was asked by Mr. Mellin to make copies of a few pages from the black day planner. Mr. Chellis testified that in response to Mr. Mellin's request he located the black day planner. Mr. Chellis photocopied the relevant pages, and in Mr. Mellin's absence, left the original black day planner and photocopied pages in Mr. Mellin's chair in his office. Mr. Chellis testified that he next saw the black day planner in the courtroom on the Government counsel's table. Mr. Mellin said that he was focused on the black day planner because the defense had introduced certain pages of it into evidence, and referred to it in its opening statement. Mr. Mellin anticipated that the defense would use the photocopied pages again in their closing argument. Mr. Mellin apparently studied the black day planner and the relevant pages in preparation for his closing argument.

To this end, Mr. Mellin made specific mention of the black day planner in his closing arguments. Mr. Mellin's closing argument contained the following statement:

> "Then you can look at the other evidence in this case as well. And you have two daytimers in this case. You have the one that she always takes to work, and you have a little pocket one as well. And you look at these, these both talk about her coming home. Now, there's one difference between the two and don't let Mr. Lieberman or the defense confuse you about the difference. The difference is irrelevant. The difference is that in this little pocket calendar it says, pick up at Jay's 7 to 8. Now we don't have Doris Lentz here to testify, but you can use your common sense and logic in figuring it out."[7]

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[7] *United States v. Lentz*, 01-150-A, Trial Transcript June 16, 2003 at 130 lines 9-22.

The "little pocket calendar" is a reference to the unadmitted black day planner. The fact that Mr. Mellin mentioned both day planners in his closing arguments demonstrates that he ascribed a great deal of importance to the black and brown day planners.

F. THE BROWN DAY PLANNER: AUSA STEVEN MELLIN

Similarly, the Court attributes responsibility for the intentional submission of the brown day planner to Mr. Mellin for two reasons. First, Mr. Mellin had physical possession of the brown day planner during his closing argument. Second, although he appears not to recall, several witnesses testified that Mr. Mellin had a conversation with Ms. Clark about whether he could submit the brown leather covering of the brown day planner, along with the appropriate photocopied pages of the planner, to the jury. It should be noted that Mr. Mellin had the brown day planner and the photocopied pages in his hand at the time of this conversation.

Several of the attorneys and Mr. Chellis recalled Mr. Mellin holding up the brown day planner during his closing argument. This act of holding the brown day planner before the jury served to focus their attention on it because he wanted to make sure they reviewed it. Accordingly, it is reasonable to infer that Mr. Mellin was himself focused on the importance of the brown day planner. Similarly, Ms. Clark, Mr. Lieberman, and Mr. Salvato knew that there were many pages of irrelevant, excluded, and prejudicial evidence in the brown day planner, which is why Mr. Lieberman was so adamant that the contents of the brown day planner had to be removed so that only the relevant pages would be presented to the

jury. To be sure, three members of the defense team testified that Mr. Mellin had a conversation with Ms. Clark about whether he could use the brown leather binder.

Mr. Mellin's recollection of the facts of this case causes the Court great concern. Mr. Mellin had difficulty recalling if he was in the courtroom when the evidence was assembled for the jury. He had no recollection of any discussion he had regarding the removal of the contents of the brown day planner with defense counsel Ms. Clark and Mr. Lieberman. Also, Mr. Mellin seemed to have no sense of the importance of ensuring that the brown day planner conformed to the Court's ruling on the admission of evidence. Mr. Lieberman, Mr. Salvato, and Ms. Clark testified that when the evidence was being prepared, Mr. Mellin was holding the brown day planner and the photocopied pages in his hands and he asked her whether he could submit the brown day planner folder to the jury. Mr. Mellin does not deny having a conversation with defense counsel about the evidence, but he testified that he had no recollection of any discussions with counsel regarding the use of the brown day planner folder.

Mr. Mellin's failure to recall his handling of certain evidentiary matters further undermined his credibility with the Court. As lead counsel, Mr. Mellin, both as an officer of the Court and as an advocate, would be expected to be sensitive to what evidence was admitted. Mr. Mellin's testimony that he was not in the courtroom when the evidence was prepared for the jury, does not comport with the testimony of other Government witnesses. For

instance, Ms. Haynes testified that she recalled turning to Mr. Mellin for a final confirmation on whether the Government's evidence was ready for delivery to the jury. Additionally, Mr. Bowie's testimony does not support Mr. Mellin's assertion that he was not in the courtroom when the evidence was prepared for presentation to the jury. Mr. Mellin testified that he was not in the courtroom when the evidence was prepared for presentation to the jury because he was focused on Mr. Bowie's preparation of amended CD's of the audio clip telephone messages between Jay and Doris Lentz. However, Mr. Bowie testified that he prepared amended CD's of the audio clips the night before the case was submitted to the jury. Accordingly, the CD was prepared before the morning the evidence was sent to the jury and there was no need for Mr. Mellin to leave the courtroom. The charges against Mr. Lentz were largely based on circumstantial evidence.[8] Mr. Mellin was aware that Ms. Lentz's state of mind with respect to when her daughter would return from Indiana would be critical to the jury. Accordingly, it is not plausible that Mr. Mellin would not recall what happened to two of the most important pieces of evidence in this case.

G. SUMMARY OF FINDINGS OF FACT

The Court finds that the following themes emerge from the testimony. First, the Government is unequivocally responsible for the extraneous evidence which was presented to the jury. The

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[8] *See United States v. Lentz*, 275 F. Supp.2d 723 (E.D. Va 2003)(summarizing the Government's evidence against the Defendant Jay Lentz).

Government - and only the Government - had control over the physical evidence, specifically the two day planners. Second, the Government cannot, and does not, assert that it was unaware of the fact that Doris Lentz's brown day planner was excluded from evidence. Third, the Court finds that Mr. Mellin is ultimately responsible for both day planners being presented to the jury.

Mr. Mellin was the last person in possession of the black unmarked and unadmitted day planner. He referred to it in his closing argument. He specifically requested the original black day planner from Mr. Chellis, the United States Attorney's law clerk. Mr. Chellis recalled seeing the black day planner on Government counsel's table. Mr. Chellis, the Government's law clerk who reviewed all of the evidence with the clerk and with defense counsel testified that he did not see the black and brown day planners placed with the admitted exhibits for the jury.

The Court concludes that Mr. Mellin placed the two day planners with the evidence for the jury. He did this after the lawyers and the court clerk had prepared all of the admitted evidence for the jury. As lead Government counsel, no one would have any reason to question what he placed with the evidence. Additionally, no one else had access to the black day planner but Mr. Mellin.

The Court also infers from the testimony that Mr. Mellin was responsible for placing the brown day planner with the evidence to be delivered to the jury. Mr. Chellis made photocopies of the relevant pages from the brown day planner, which he offered to Ms.

Clark to review. She declined, and then the attorneys reviewed the evidence to be submitted to the jury with Ms. Solomon. Next, Mr. Mellin took the brown day planner, and the photocopies made by Mr. Chellis, over to the tables reserved for the defense to ask Ms. Clark if he could submit the photocopied pages from the brown day planner to the jury in the brown leather-bound folder. This was the last time anyone can account for the brown day planner before it went to the jury. Accordingly, Mr. Mellin was the last person to be seen with the brown day planner.

The Court concludes that after all of the lawyers and the courtroom clerk completed their review of the evidence, Mr. Mellin placed the unadmitted day planers in the evidence box. The unmarked black day planner, inadmissible evidence, did not emerge from the clear blue sky, and land in the jury room. Mr. Mellin had the black day planner last and was well aware it was inadmissible. Similarly, Mr. Mellin's submission of the whole brown day planner to the jury was an intentional act. Mr. Mellin, after discussing whether he could send the brown day planner to the jury with defense counsel and acknowledging the Court's Order excluding the whole day planner, inserted the brown day planner in the evidence box as evidence for the jury. Mr. Mellin is responsible for this impermissible taint on the Lentz trial. Accordingly, Mr. Mellin, the Government's lead prosecutor, has to bear the responsibility.

Mr. Mellin denies making a mistake, and fails to acknowledge any personal responsibility, or even the slightest contrition, for this grave situation. The Court concludes that Mr. Mellin's

testimony indicates much more than a lack of credibility; rather his testimony demonstrates his intent to act outside the Orders of this Court and the confines of the law. In sum, the Court finds that Mr. Mellin's actions with the day planners suggest that this conduct was not a benign act or negligent error. Rather this action was reckless, and it was intentional.

V. DISCUSSION

A. STANDARD OF REVIEW

When the district court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether a motion for new trial should be granted if the judgment of acquittal is later vacated or reversed. *See* Fed. R. Crim. P. 29(d)(2). If the appellate court affirms the judgment of acquittal, this Court's consideration of Defendant's motion for a new trial will be rendered moot. Fed. R. Crim. P. 29 (d)(3)(A). In accordance with the above stated law, the Court will consider and conditionally rule on Defendant's motion for a new trial.

When considering a motion for a new trial based upon juror misconduct, the Court must determine whether the moving party was harmed by juror misconduct or bias so as to necessitate the grant of a new trial in the interest of justice. *See United States v. Barnes*, 747 F.2d 246, 250 (1984); *McIlwain v. United States*, 464 U.S. 972, 975 (1983).

In *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996), the Fourth Circuit articulated a three-step test for the review of

extrajudicial influences, based upon the Supreme Court's evaluation of such influences in *Remmer v. United States*, 347 U.S. 227, 228-29 (1954) (hereinafter *Remmer I*). First, the party asserting that improper jury communications influenced the verdict must present "competent evidence" regarding the influences and show that they were more than "innocuous interventions." *Cheek*, 94 F.3d at 141. Second, the *Remmer I* presumption of prejudice is automatically activated if the moving party demonstrates the influence was more than benign. *Id.* Third, the burden shifts to the party in opposition to prove the communication was not prejudicial because there exists no "reasonable possibility that the jury's verdict was influenced by an improper communication" and, thus, the communication was harmless to the moving party. *Id.; see also Barnes*, 747 F.2d at 250. In other words, a motion for a new trial based upon the submission of extraneous evidence to the jury must be granted unless it is "highly probable that the error did not affect the judgment." *United States v. Urbanik*, 801 F.2d 692, 698-99 (4th Cir. 1986).

The Court, in an evidentiary hearing with all interested parties permitted to participate, must consider the circumstances of the extrajudicial communication, the impact of the communication on the jurors, and whether the communication was prejudicial. *See Remmer I*, 347 U.S. at 230. The court may utilize jury testimony to determine whether extraneous evidence was introduced to the jury. *Cheek*, 94 F.3d at 143. However, the court may not consider

testimony regarding the jury's deliberation process, including statements concerning a jury member's belief that extraneous evidence influenced the verdict. Fed. R. Evid. 606(b); *see also Tanner v. U.S.*, 483 U.S. 107, 121 (1987).

B. ANALYSIS

In the event that the Fourth Circuit Court of Appeals reverses this Court's Order granting the Defendant's Motion for a Judgment of Acquittal, Defendant Lentz is entitled to a new trial because extraneous unduly prejudicial evidence influenced the jury's verdict. Fed R. Crim. P. 29(d)(3)(A). The issue is whether there exists a reasonable possibility that the Government's submission of the unadmitted black and brown day planners to the jury during deliberations influenced the jury's verdict. The evidence demonstrates that the submission of the evidence was more than an innocuous intervention because (1) the error was constitutional in nature because the Defendant's Sixth Amendment right to confront witnesses against him was affected; and (2) the extraneous evidence was so prejudicial that it affected the Defendant's ability to have a fair trial. Additionally, the presumption of prejudice was justifiably triggered because of the serious nature of the error. Finally, the Government is unable to overcome the presumption of prejudice because (1) this evidence is not cumulative; (2) the submission of this evidence unfairly bolstered the Government's case; and (3) the submission of this evidence irreparably destroyed the Defendant's credibility and, therefore, his defense. Accordingly, the Defendant's motion for a new trial shall be

granted.

1. Cheek Test Step One: The evidence submitted to the jury was more than an innocuous intervention.

The first step of the *Cheek* three-step test requires the party challenging the verdict to introduce competent evidence that the extrajudicial communications, in this instance, the presentation of inadmissible evidence to the jury, were more than innocuous interventions. *See Cheek*, 94 F.3d at 141. The submission of inadmissible evidence is not innocuous in this instance because the submission of extraneous evidence to the jury was a violation of the Defendant's Sixth Amendment right to confront witnesses against him. Furthermore, the black and brown day planners contained hand written notes from the deceased. This type of evidence is undoubtedly influential, and, thus, not innocuous. Moreover, it is not trustworthy and reliable, as the Confrontation Clause requires.

a. The submission of extraneous evidence to the jury violated the Defendant's Sixth Amendment right to confront witnesses against him.

The fact that the jury viewed the evidence contained in the black and brown day planners is a violation of the Defendant's Sixth Amendment right to confront witnesses against him because most of the evidence in the planners is hearsay, which affords the Defendant no opportunity to cross-examine the declarant at trial. The black and brown day planners, which had belonged to the decedent victim, contained moving and powerful hand written notes regarding (1) harassing and threatening phone calls; (2) a protective order; (3) conversations with Julia; (4) telephone

numbers for an Arlington County police detective and a domestic violence support group; and (5) a picture of Julia. This evidence, although compelling, bears no indicia of reliability because these statements do not fall within any of the twenty-three recognized exceptions to the hearsay rule, nor do they indicate any particularized guarantees of trustworthiness. Accordingly, the fact that this evidence was published to the jury constitutes a violation of the Defendant's Sixth Amendment right to confrontation.[9]

A violation of the Confrontation Clause occurs "when hearsay evidence is admitted as substantive evidence against the defendan[t], . . . with no opportunity to cross-examine the hearsay declarant at trial, or when an out-of-court statement of an unavailable witness does not bear adequate indications of trustworthiness." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). The central concern of the Confrontation Clause is ensuring the reliability of evidence against a criminal defendant, which is accomplished by subjecting the evidence to rigorous testing in the context of an adversary proceeding before the trier of fact. *Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999). The Confrontation Clause limits the admissibility of hearsay evidence in a criminal trial. The inquiry into whether evidence violates the Confrontation Clause consists of whether the witness is unavailable and whether the

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[9] The Sixth Amendment provides that in all criminal prosecutions "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

evidence is trustworthy. Given that the day planners belonged to the decedent victim in this case, there is no need to consider the issue of witness availability. Accordingly, the Court will address the second part of the test for admissibility pursuant to the Confrontation Clause -- whether the hearsay statements can be deemed trustworthy.

The extraneous evidence in the black and brown day planners is not trustworthy and cannot be relied upon because it does not bear any indicia of reliability. Hearsay statements will not be admissible unless they bear "adequate indicia of reliability." *See Ohio v. Roberts*, 448 U.S. 56, 57 (1980)(internal quotations omitted). Reliability can be inferred where the evidence falls within a firmly rooted hearsay exception or if it has particularized guarantees of trustworthiness. *Roberts*, 448 U.S. at 57, 66; *Lilly*, 527 U.S. at 125. The statements neither fall within any of the twenty-three recognized exceptions to the rule against hearsay nor contain any of the particularized guarantees of trustworthiness. The Court must, therefore, consider whether the statements contained in the black and brown day planners are the kind of evidence that, if admitted into evidence, would violate the principles of the Confrontation Clause because they are untrustworthy and unreliable.

i. The extraneous evidence does not fall within a firmly rooted hearsay exception.

The hearsay statements contained in the black and brown day

planners do not fall within any firmly rooted hearsay exceptions because they are not admissible pursuant to the Federal Rules of Evidence and are not otherwise so trustworthy that adversarial testing would add little their reliability. The Supreme Court has defined a firmly rooted hearsay exception as one that, "in light of longstanding judicial and legislative experience, . . . rests on such a solid foundation that admission of virtually any evidence within it comports with the substance of the constitutional protection." *See Lilly*, 527 U.S. at 125-26 (internal quotations omitted). In other words, evidence admitted under the firmly rooted hearsay exception standard must be so trustworthy that adversarial testing would add little to its reliability. *See Idaho v. Wright*, 497 U.S. 805, 821 (1990). "This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proven over time to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would be the obligation of an oath and cross-examination at a trial." *Lilly*, 527 U.S. at 126.

The Confrontation Clause is not a codification of the rules of hearsay and their exceptions as they existed historically at common law. *See California v. Green*, 399 U.S. 149, 157 (1970). Although the Confrontation Clause and the hearsay rules are generally designed to protect similar values, the overlap between the two is not complete. *See U.S. v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001) *cert. denied*, 534 U.S. 897. In other words, violations of the

Confrontation Clause may be found even where the statements are properly admitted under a long established hearsay rule exception. *Id.* Similarly, merely because a statement is admitted in violation of the hearsay rule does not automatically mean that rights under the Confrontation Clause have been violated. *Id.* However, the conclusion that the Confrontation Clause is not violated in such circumstances turns on whether the declarant's out-of-court statements are "subject to a full and effective cross examination," where " the declarant is testifying as a witness." Green, 399 U.S. at 158. Such circumstances did not exist with respect to the day planner evidence. It is obviously impossible for the decedent victim to testify as a witness. Moreover, an estranged former spouse's handwritten notes in a day planner, written while she was embroiled in a difficult divorce, are not inherently trustworthy such that adversarial testing would have little impact on their reliability. Thus, in the instant case, the submission of the handwritten notes in the black and brown day planners to the jury violates the federal rules against hearsay and the Confrontation Clause because this evidence is, on its own without adversarial testing, not trustworthy or reliable as the Confrontation Clause requires. *See Wright*, 497 U.S. at 821.

(a) The extraneous evidence is not admissible under the federal rules against hearsay.

Prior to the trial, the Court excluded the majority of the evidence in the black and brown day planners as hearsay. In a

seventy-six page pretrial opinion, the Court considered, among other things, whether several statements made by the alleged decedent victim, Ms. Doris Lentz, to various individuals with reference to prior abuse by the Defendant were admissible as non-hearsay or exceptions to the hearsay rule. These statements included Ms. Lentz's fear of the Defendant, her plans surrounding the date of her disappearance, and writings documenting such items. The Court examined the admissibility of the evidence pursuant to Rule 803(1), the present sense impression exception to the hearsay rule; Rule 803(2), the excited utterance exception to the hearsay rule; and Rule 803(3), the state of mind exception to the hearsay rule. *United States v. Jay E. Lentz*, Criminal Action No. 01-130-A, Memorandum Order at 6-7 (E.D. Va. May 14, 2002) (hereinafter Evidentiary Opinion). The Court also reviewed whether the evidence was non-hearsay pursuant to Federal Rule of Evidence 801, whether the evidence qualified for admission pursuant to the residual hearsay exception, Rule 807, and whether the statements were admissible pursuant to the forfeiture by wrongdoing exception, Rule 804(b)(6). *Id.* at 5.

The evidence presented by the Government may be characterized in three ways: (1) evidence that was admitted; (2) evidence that was not admitted; and (3) evidence that the Government never sought to admit. It should be noted that two pages of the brown day planner and four pages of the black day planner were admitted into evidence. These statements were deemed admissible pursuant to Rule 803(3), the state of mind exception to the hearsay rule, and are

statements that reflect upon Ms. Lentz's beliefs with respect to when her daughter was coming home from Indiana. The extraneous evidence is evidence that the Government sought to admit, but that the Court determined to be inadmissible, as well as evidence that the Government never sought to admit. The extraneous evidence determined to be inadmissible hearsay may be divided into four categories: (1) notations concerning harassing/threatening telephone calls; (2) notations concerning a protective order; (3) notations relating to conversations with Julia; and (4) telephone numbers for an Arlington County police detective and a domestic violence support group.

(1) Notations concerning harassing/threatening phone calls.

The following entries are from handwritten, undated slips of note paper found within the brown day planner.

- *"School rec'd threatening phone calls. Only way Julia stay Jay sign stat. That he understands cannot pu Julia @ school.*[10]*"*
- *#95-0602025 6/21/95; Chris Bibro; trespassing incident/harassing phone calls*[11]

The following entry is from the black day planner.

- *February 11, 1996, 5:05p.m. rec'd abusive phone call - where the hell was I - why not pick Julia up between 4 - 4:30 - said he hadn't asked for early pu therefore pu at 6:00....*

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[10] *See* Lentz 000001871

[11] *See* Lentz 000001878

The foregoing statements are hearsay and are not admissible as exceptions to the rule against hearsay pursuant to Rules 803(1)-803(3) because these statements were not made contemporaneously as required by the present sense impression and excited utterance exceptions to the hearsay rule. Fed. R. Evid. 803(1), 803(2), 803(3). Furthermore, the statements could not be said to refer to any relevant state of mind, emotion, sensation, or physical condition as required by the state of mind exception to the hearsay rule. Fed. R. Evid. 803(3). The Court declined to admit these statements noting that "in light of the hotly contested divorce proceeding, it is extremely plausible that Ms. Lentz had an opportunity to reflect and possibly fabricate or misrepresent her thoughts in her diary." (Evidentiary Opinion at 39.) Furthermore, the Court opined that the state of mind exception to the hearsay rule did not apply to the statements regarding picking up Julia from school because they do not demonstrate any emotion or relevant feeling. *Id.*

Additionally, the Court determined that these statements were not admissible as non-hearsay, pursuant to Rule 801, or under the residual hearsay exception to the hearsay rule, Rule 807, because the statements were irrelevant and not trustworthy. *Id.* at 42-44. Under Rule 801(c), a statement that is non-hearsay is not offered to prove the truth of the matter asserted. The Court found that if the statements regarding the harassing and threatening phone calls were not offered to prove the truth of the matter asserted, then they were irrelevant.

On the question of whether these statements should be admitted under the residual hearsay exception, Rule 807, the Court considered, (1) the unavailability of the declarant; (2) the circumstantial guarantees of trustworthiness surrounding the statement; (3) whether the statement related to a material fact; (4) whether the statement was the most probative evidence on the point; (5) whether the interest of justice was served by the statement's admittance; and (6) whether the opposing party had been given reasonable notice that the statement is being sought for admittance. *Id.* at 43; *See United States v. Shaw*, 69 F.3d 1249, 1253 (4th Cir. 1980). The Court determined that the statements could not be admitted because they did not engender circumstantial guarantees of trustworthiness. *Id.* at 43-44. In addition, the interest of justice would not be served by admitting these statements. *Id.*

(2) Notations concerning a protective order.

The following three notations relate to a protective order and were on handwritten, undated slips of note paper within the brown day planner.

- 4th Floor of courthouse - Protective Order - Ex parte Order - he's served first[12].
- Judges in Arlington want criminal charge - protective order[13].
- Karen Crane, Commonwealth Atty's Office 358-7273 protective

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[12] *See* Lentz 000001874

[13] *See* Lentz 000001875

order/advice - Officer Williams #951-204033[14].

Similarly, these statements were not admissible pursuant to the present sense impression and the excited utterance exceptions to the hearsay rule because the statements were not made contemporaneous with the occurrences that they describe. Additionally, these statements were not admitted because they do not refer to Ms. Lentz's state of mind.

Furthermore, these statements could not be admitted as non-hearsay or under the residual hearsay exception because they were irrelevant if not offered to prove the truth of the matter asserted and could not be considered trustworthy or reliable since they have no independent indicia of reliability and the Defendant did not have an opportunity to cross-examine the declarant.

(3) Notations relating to conversations with Julia.

The following six notations are from the black day planner and concern conversations that either Ms. Lentz or the Defendant had with Julia.

- January 3, 1996 - Jay pu Julia - she said she wanted to stay with mommy - he told her to stop playing games and get her coat on.
- January 6, 1996 - My daddy told me you called the police on him. Is that true?
- January 7, 1996 - My daddy told me when I was a baby I almost died because you couldn't feed me because you were taking

[14] *See* Lentz 000001877; 000001878

drugs.

- January 10, 1996 - Do you want my dad's house? My dad told me you want money from him. Is that true?
- January 11, 1996 - My dad says he loves me more than you. He says he loves me so much he wishes he could have me - live with me.
- February 23, 1996 - My daddy told me the judge was going to make him pick me up from school.

Once again, it cannot be said that these statements are admissible under any of the exceptions to the rule against hearsay because they are double hearsay, where Ms. Lentz refers to what Julia said, and triple hearsay, where Ms. Lentz refers to what Julia said her father said, and, as such, these statements are patently unreliable. Furthermore, these statements are not relevant and would not be admissible pursuant to Rule 402 because they are not logically related to the matters at issue in this case. Fed. R. Evid. 402.

(4) Telephone numbers for an Arlington County Detective and a domestic violence support group.

The following notations are from handwritten, undated slips of note paper found in the brown day planner.

- Det. Capitello - Arl. Co. PD 358-4240; 6/12 spoke with 1:55p.m.[15]
- 358-4868 - Eileen Segal - Free counseling for domestic

[15] *See* Lentz - 000001879

violence support group[16].

These statements are also not admissible under the present sense and excited utterance exceptions because they were not made contemporaneously with the event. It also cannot be said that these statements are admissible under the state of mind exception to the hearsay rule because they do not refer to any relevant state of mind or emotion.

(b) The extraneous evidence does not fall within a hearsay exception that otherwise rests upon a solid foundation of reliability.

The Government does not submit, and the circumstances do not implicate, the existence of a hearsay exception that is not codified by the Federal Rules of Evidence, and that would encompass the extraneous evidence contained in the black and brown day planners. As stated above, the question of whether the admission of evidence violates the Confrontation Clause cannot be answered solely by answering the question of whether such evidence is admissible under the Federal Rules of Evidence because the Federal Rules of Evidence concerning hearsay do not constitute a codification of the Confrontation Clause. *Dhinsa*, 243 F.3d at 654. However, in order for hearsay evidence to be admissible pursuant to the Confrontation Clause, it must fall within a firmly rooted hearsay exception to the Federal Rules of Evidence or fall within a hearsay exception that otherwise rests upon a solid foundation of reliability. *Lilly*, 527 U.S. at 125-26.

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[16] *See* Lentz - 000001877; 000001880

It is clear that the above listed statements do not rest upon a solid foundation of reliability because there is no longstanding exception to the rule against hearsay that would allow these statements into evidence where the Federal Rules of Evidence do not. The Government does not cite any such hearsay exceptions, the case law does not point towards any such exceptions, and the circumstances surrounding this evidence do not implicate any such hearsay exceptions that would warrant the use of these statements in the interest of justice.

ii. *The statements do not contain particularized guarantees of trustworthiness.*

This evidence does not fit under any firmly rooted hearsay exception and the extraneous evidence violates the Confrontation Clause because it does not contain particularized guarantees of trustworthiness. The "trustworthiness" test is essentially a "catch-all" provision created with the idea that there may be, in the exceptional case, a statement of an unavailable witness that is "incontestably probative, competent, and reliable, yet nonetheless outside of any firmly rooted hearsay exception." *Lilly*, 527 U.S. at 136. The Court must consider whether the evidence to be evaluated under this test is so trustworthy that adversarial testing would add little to its reliability. *See Wright*, 497 U.S. at 820-21. In other words, the evidence admitted under this test must be at least as reliable as evidence admitted under a firmly rooted hearsay exception. *Id.*

Furthermore, the Court must consider the totality of the circumstances that surround the making of the statements in order to render a declarant particularly worthy of belief. *Id.* The circumstances surrounding these statements were within the context of a bitter divorce. Immense animosity existed between the parties, which in turn provides sufficient cause for concern about the fabrication and amplified negative perceptions of estranged spouses in the midst of a hotly contested divorce. Accordingly, these circumstances are not conducive to a finding that the handwritten notes in the black and brown day planners are reliable such that they should be admitted under this "catch-all" provision of the Confrontation Clause.

b. Much of the evidence submitted to the jury was so prejudicial that it prevented the Defendant from receiving a fair trial.

The black and brown day planners contained several notes and articles that were not admitted because they were irrelevant and prejudicial. One such article is a picture of Julia. Additionally, several of the statements that were excluded on hearsay grounds, including the statements regarding harassing/threatening telephone calls, a protective order, conversations with Julia, and domestic violence, are also prejudicial to the Defendant. Rule 402 of the Federal Rules of Evidence states pertinent in part that "evidence which is not relevant is not admissible." Fed. R. Evid. 402. Rule 403 excludes relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury. Fed. R. Evid. 403. The fact that the jury was allowed to view such powerful inadmissible evidence leaves no question that the jury was influenced by these articles, which were excluded because of their potential to confuse, manipulate, and mislead the jury.

(1) Notations concerning harassing/threatening telephone calls.

At the very least, this evidence has the potential to confuse the issues because it suggests that Mr. Lentz was abusive towards his ex-wife in the months prior to her disappearance and abusive towards the staff at his daughter's school. The evidence regarding harassing and threatening phone calls is classic bad character evidence because it leads to the inference that the Defendant was angry with Ms. Lentz and killed her in a rage. Even if Mr. Lentz exchanged angry words and insults with Ms. Lentz, such instances do not necessarily lead to physical violence. Accordingly, any such reference to Mr. Lentz's angry words towards Ms. Lentz and the staff at his daughter Julia's school are not relevant to the issue of whether he is responsible for her kidnapping and death.

(2) Notations concerning a protective order.

The issue with the notations concerning a protective order is that they lead to the unfair inference that Ms. Lentz, needed, sought, and obtained a protective order against Mr. Lentz. In fact, no evidence of a protective order, or of Ms. Lentz's attempt to obtain one, was ever presented at trial. Furthermore, because there is no indication that Ms. Lentz ever applied for an order of

protection against Mr. Lentz, these statements are not relevant and would have been excluded pursuant to Rule 402. Even assuming, *arguendo*, that these statements were relevant, they are extremely prejudicial and would have been excluded under Rule 403 because any probative value these statements may have is outweighed by the danger of unfair prejudice and confusion of issues by the jury.

(3) Notations concerning conversations with Julia.

These notes are significant because the jury's judgment was clouded by evidence that the Defendant spoke disparagingly about Ms. Lentz, his ex-wife, to his daughter. Similarly, this kind of testimony would be relevant to show bad character, which would not be admissible under Rule 404. Putting aside the fact that we have no idea if these conversations actually occurred, they cast Mr. Lentz in the worst possible light as a husband and a father.

(4) Notations concerning domestic violence.

This evidence is not relevant and is not admissible pursuant to Rules 402 and 403 because there is no evidence to corroborate the fact that Ms. Lentz was a victim of domestic violence at the time of her disappearance and any extraneous information that supports that inference is unduly prejudicial. In other words, the jury was told that Mr. and Ms. Lentz separated in 1991 and divorced in 1993. Testimony was presented that suggested that any abusive behavior that may have occurred between these two parties occurred before they were separated. The evidence in the black and brown day planners, which is from 1995 and 1996, leads to the inference that the alleged abusive behavior continued, which, given the fact

that the Defendant never had an opportunity to cross-examine this testimony, is certainly unduly prejudicial.

(5) Picture of Julia.

The picture of Julia is not admissible because it is irrelevant, under Rule 402, because it does not tend to prove or disprove anything and is prejudicial, pursuant to Rule 403, and because it serves only to incite the emotions of the jury.

Any one piece of evidence regarding the (1) harassing/ threatening telephone calls, (2) protective order, (3) conversations with Julia, (4) domestic violence support, and the (5) picture of Julia, if it had inadvertently gone to the jury would have been sufficient to suggest that the submission of evidence was not an innocuous intervention and affected the Defendant's ability to have a fair trial. However, given the fact that the jury viewed all of the above listed evidence and additional evidence in the black and brown day planners not described herein, there is no question that the jury's ability to be impartial was compromised.

2. Cheek Test Step Two: The presumption of prejudice is triggered.

The second prong of the *Cheek* test requires proof that the extrajudicial communications were more than innocuous interventions such that the presumption of prejudice is justified. *Cheek*, 94 F.3d at 141. The Court, with respect to this requirement, recognizes that there may be some contacts with the jury that are so insignificant that they could not justify a presumption that the

communication was prejudicial. *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 (4th Cir. 1986). The circumstances in this case clearly give rise to the presumption of prejudice because the act of submitting extraneous evidence to the jury violated the Defendant's constitutional rights and prevented him from having a fair trial.

The Fourth Circuit recognized in *Dennis v. General Electric Corporation*, 762 F.2d 365, 367 (4th Cir. 1985) that there may be some improper contacts with the jury that simply are so benign that they should not give rise to the presumption of prejudice. In *Dennis*, the improper contact occurred between the jury and Defendant's counsel. The jury sent Defendant's counsel a cartoon that made fun of lawyers and the attorney later made light of the jury's submission in his closing argument. The Plaintiff argued that the communication between the jury and the Defendant's counsel was improper and that it warranted the grant of a new trial because it was prejudicial. The Court, however, concluded that the "contact" with the jury was indirect and inadvertent and did not appear to improperly influence the jury. The Court opined that "[u]nless the jury's impartiality is sacrificed, mere technical and unintentional contacts between counsel and the jury should be deemed harmless." *Id.*

Similarly, in *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997), the Court addressed the issue of whether the Defendant's due process rights were violated because the jury was allowed to use as

scrap paper the reverse side of an outdated form letter, used by a previous prosecutor to thank former jurors for their service. The jury used these forms as notepads while they were deliberating. The Court concluded that this "extrajudicial contact" with the jury was nothing more than an innocuous intervention because, even if the jurors were aware of the form letters, they had no substantial and injurious effect or influence on the jury's verdict. *Id.* at 422.

By comparison, in the instant case, there is no question that the jury's impartiality has been sacrificed by the exposure to extraneous evidence because the submission of this evidence was a violation of the Defendant's Sixth Amendment right to confront witnesses against him and affected his ability to obtain a fair trial. The Court took great care in seeking to exclude the majority of this evidence before trial because it was clear that this evidence was unreliable and untrustworthy and if submitted to the jury would surely have a substantial effect upon them. Accordingly, the Defendant has demonstrated that the submission of extraneous evidence is significant enough to justify the presumption that the error was prejudicial.

3. **Cheek Test Step Three: A reasonable possibility exists that the jury's verdict was influenced by the submission of evidence**.

The third step of the *Cheek* Test requires that the non-moving party prove beyond a reasonable doubt that there is no possibility that the jury's verdict was influenced by the improper submission

of evidence. *See Cheek*, 94 F.3d at 141. The Government fails to prove beyond a reasonable doubt that the improperly submitted evidence was harmless and did not influence the jury's verdict because the extraneous evidence is not cumulative, irrelevant, or benign. The Government argues that (1) the extraneous evidence merely added to what the jury already knew about case; (2) the evidence did not add to the Government's case because if it did, then the prosecution would have sought to have the evidence admitted; and (3) the jury had more than enough evidence to convict the Defendant; therefore, the improperly submitted evidence was benign. The issue is whether, after the presumption has been invoked and the rebuttal evidence offered, there remains a reasonable possibility that the jury's verdict was influenced by the improperly submitted evidence. *Haley*, 802 F.2d at 1538. The party benefitting from the verdict has the very heavy burden to establish that the error in submitting the documents to the jury was harmless beyond a reasonable doubt. *U.S. v. Greene*, 834 F.2d 86, 88 (4th Cir. 1987); *Haley*, 802 F.2d at 1537. In other words, the Government must prove that there was no reasonable possibility that the verdict was affected by the extraneous evidence. *See Cheek*, 94 F.3d at 142. In considering whether the submission of extraneous evidence was harmless to the Defendant, the Court must examine the "entire picture," including the facts and the impact on the jury. *See id.* The Government fails to overcome the presumption that the improperly submitted evidence was prejudicial

because (1) the extraneous evidence bolstered the Government's theories of the case; (2) the evidence undermined the Defendant's theory of the case; and (3) the improper submission of this evidence violated the constitutional rights of the Defendant.

The Government contends that the jury's verdict was not substantially swayed by the improper introduction of evidence because the majority of the evidence in the black and brown day planners is benign and the remaining notations are of minimal probative value, are not prejudicial, and are cumulative of other evidence that was admitted by the Court.

With respect to the Notations concerning harassing/ threatening phone calls, the Government argues that these statements are merely cumulative because the jury had the opportunity to hear evidence that Ms. Lentz received threatening and harassing phone calls from the defendant. Specifically, the Government refers to Ms. Lentz's deposition, taken on February 19, 1996, in which she talks about how she had received threatening phone calls, which she wrote down in her calendar. Furthermore, the Government argues that the statement referring to Julia's school receiving threatening phone calls is innocuous because the jury never heard evidence about the incident and the notation does not involve a threat to Ms. Lentz but rather a threat to an unknown school at an unknown time; therefore, it could not possibly have an influence on the jury's verdict.

The Court simply cannot accept the Government's argument as sufficient to prove that the submission of the evidence regarding

harassing/threatening phone calls was harmless. First, the evidence is not cumulative. Each piece of evidence submitted to the jury is a piece of the puzzle that, once complete, creates a picture that the finder of fact must interpret. The extraneous evidence is akin to pieces of the puzzle that do not belong and that totally alter and distort the final picture. The jury indeed heard evidence regarding the alleged harassment Ms. Lentz received at the hands of the Defendant; however, the evidence was deposition testimony taken under oath and admitted pursuant to the state of mind exception to the hearsay rule. (Evidentiary Opinion at 40-41.) Restated, that evidence was admissible only to the extent it showed that declarant's state of mind and not the facts engendering that state of mind. *See Id.* at 38. Furthermore, unlike the circumstances surrounding the extraneous evidence, the Defendant had an opportunity to develop the deposition testimony. Additionally, the fact that the jury had heard no evidence regarding the harassment that allegedly occurred at the day care is exactly the problem with this testimony. It was never placed in context and is thus ripe for misinterpretation and leads to the confusion of the jury. It serves as bad character evidence against the defendant, where he did not put forth any evidence of good character. The fact is that the submission of this evidence to the jury constituted constitutional error because the Defendant's right to confront witnesses against him was violated since the evidence submitted was untrustworthy and unreliable and he was not given an opportunity to subject this testimony to any "truth-finding" tools

such as cross-examination. To simply claim that the evidence was cumulative and irrelevant is not sufficient to overcome evidence of constitutional error.

The Government argues that the notations concerning a protective order did not influence the jury because, once again, the evidence is merely cumulative of evidence that refers to Ms. Lentz's fear of the Defendant. The Government points to the fact that at least a dozen witnesses testified that Ms. Lentz was terrified of the Defendant and had taken affirmative steps to avoid him as evidence that the jury was already aware that Ms. Lentz feared the Defendant; therefore, this extraneous evidence could not possibly have influenced the jury. Again, this argument is not persuasive because the evidence is not cumulative. Every piece of evidence helps to complete the final picture of the puzzle. This evidence only serves to cloud the picture because it suggests that Mr. Lentz was physically abusive to his ex-wife, a crime for which he was never convicted. Additionally, as stated above, there is no evidence to suggest that Ms. Lentz ever obtained a protective order against Mr. Lentz. Also, Mr. Lentz was never convicted of assaulting Ms. Lentz. This evidence bolstered the Government's theory that the Defendant's abusive behavior continued right up until the time of her disappearance, whereas the Defendant argued that any alleged abuse took place only in 1991, when the couple separated, a full five years prior to Ms. Lentz's disappearance. In other words, the Defendant's theory that he had not experienced any alleged volatile contact with Ms. Lentz since 1991 was

completely undermined by the improperly submitted evidence. Accordingly, an assertion that the extraneous evidence was "cumulative" is not enough to prove that no reasonable possibility exists that the submission of evidence regarding a protective order improperly influenced the jury.

The Government labels Ms. Lentz's notes regarding conversations with her daughter Julia as harmless or innocuous. Specifically, the Government refers to the conversations Mr. Lentz allegedly had with Julia as harmless because the jury was already aware that Ms. Lentz had reported the Defendant to the police on several occasions, that there was hostility between the parties, that they were fighting over the proceeds from the sale of the house, and that Ms. Lentz required Mr. Lentz to pick up Julia at the daycare instead of her home. Additionally, the Government notes that the statement regarding Ms. Lentz taking drugs while pregnant is more impugning of her character than the Defendant's. This constitutes bad character evidence because it casts the Defendant as a man who was seeking to poison the mind of his daughter against her mother, who was portrayed by the Government to be a woman who was active in the church, a wonderful worker, intelligent, and a great mother. Furthermore, this kind of evidence bolsters the Government's theory that the Defendant kidnapped and murdered the victim in order to obtain custody of their daughter so that he would not have to pay Ms. Lentz any child support. Consequently, the Government's argument that this evidence is harmless because the jury heard similar evidence is not

persuasive because it serves to undermine the credibility of the Defendant and supports the theories put forth by the Government as to why they should believe that the Defendant is responsible for Ms. Lentz's kidnapping.

The Government continues its argument that the evidence was cumulative with respect to the telephone numbers for an Arlington County Detective and a domestic violence support group. The Government notes that the jury was well aware that Ms. Lentz reported the Defendant to the police on numerous occasions. Furthermore, the Government asserts that the jury was aware that Ms. Lentz was a victim of domestic violence; therefore, this information could not possibly have swayed the jury's verdict. First, as stated above, any information about violence in the black and brown day planners tends to support the Government's theory that the alleged domestic violence towards Ms. Lentz took place right up until the time of her disappearance, and undermines the Defendant's argument that any violent contact ended after the parties separated. Second, this information is unduly prejudicial because it casts Mr. Lentz as a violent man who committed acts of domestic violence against his wife, where the jury heard no evidence that Mr. Lentz was ever convicted of such a crime. Accordingly, the evidence that the Government presents with respect to the telephone numbers also fails to prove that the submission of this evidence was harmless because it supports the Government's theories and is unduly prejudicial.

Lastly, the Government addresses the picture of Julia. The

Government notes that it cannot envision the manner in which this evidence would tend to injure or prejudice the Defendant. Unfortunately, the Government's lack of vision is not evidence that proves that there is no reasonable possibility that the jury's verdict was influenced by the submission of this evidence. This evidence serves to incite the emotions of the jury in favor of the Government and against the Defendant. The impact of the photograph of Julia on the jury must be placed into context with the emotional tone of the trial established by the Government. During the trial, the Government introduced a child's umbrella taken from Ms. Lentz's car. The Government used the umbrella to argue that Ms. Lentz had the expectation that her daughter would be coming home on the day she disappeared. The umbrella, together with the photo, enabled the jury to associate a face with the girl who had lost her mother and would possibly lose both parents as a result of the trial. Accordingly, the Government fails to prove that the submission of the picture of Julia to the jury was harmless.

The foregoing analysis demonstrates that the Government has not met its burden to prove beyond a reasonable doubt that the submission of the extraneous evidence to the jury was harmless because (1) the evidence is not cumulative, but rather tends to support the position of the Government; (2) the evidence undermines the credibility of the Defendant's arguments; (3) the evidence is unduly prejudicial; and (4) the Government's evidence and arguments are not sufficient to overcome the fact that the submission of the extraneous evidence to the jury constituted constitutional error

because the Defendant's Sixth Amendment right to confront witnesses against him was violated.

VI. Conclusion

The nature of the error here, presentation of inadmissible hearsay evidence, implicates the Defendant's Sixth Amendment right to confrontation. The Defendant has been harmed by the presentation to the jury of victim statements, which are a reflection of an unhappy spouse in a hotly contested divorce, and an inaccurate account of past events. Ms. Lentz's statements in her day planners, written in her own words, were intentionally presented to the jury without cross examination, without the opportunity for the defense and the jury to observe her demeanor.

The day planners contain highly inflammatory matters that suggest that Mr. Lentz was convicted of or charged with assault in the Circuit Court of Arlington County, and that there were ongoing physical assaults. Mr. Lentz was never convicted of an assault on Ms. Lentz, and he was never convicted in Arlington County Circuit Court of harassment of Ms. Lentz. Ms. Lentz's day planners suggest otherwise. Ms. Lentz's day planners suggest that Mr. Lentz was recently convicted of assaulting Ms. Lentz. He was not. These matters are reported as facts in Ms. Lentz's day planners when they never occurred. Thus, Mr. Lentz was harmed because the jury could have interpreted the planners as suggesting that he had a propensity to assault Ms. Lentz, which could lead to murder. Character evidence of this sort is not generally admissible in a criminal trial. *See* Fed. R. Evid. 404.

Ms. Lentz's notes regarding the divorce reflect her negative thoughts about Mr. Lentz, as well as of the divorce itself, as one might expect. Few spouses involved in a contested divorce dispute over property and money write kind notes about their estranged spouse or their estranged spouse's intentions. It is a rare divorce case indeed where unkind words and insults are not exchanged between the parties, whether a dispute exists over children or assets. The Court finds that Ms. Lentz's deposition testimony and her notes, corroborate that she had extremely amplified negative feelings of animosity towards Mr. Lentz.

The Court was very careful pretrial in attempting to balance the Federal Rules of Evidence, which favors the admission of relevant evidence, and the Defendant's right to confrontation. The Court did this by admitting a wide array of relevant evidence and by excluding evidence that was unduly prejudicial, outweighing its probative effect. The Court's pretrial ruling was very detailed. Ms. Lentz's day planner evidence was excluded from evidence. *See United States v. Lentz*, 282 F. Supp. 2d 399, 423-25 (E.D. Va. 2002).

After considering the Government's evidence and argument at the evidentiary hearing on the Defendant's Motion to Set Aside the Verdict, the Court finds there is no question that the Government has failed to demonstrate that there was no reasonable possibility that the jury's verdict was not influenced by improper communications as required by *United States v. Barnes*, 747 F.2d 246, 250-51 (4th Cir. 1986) and *United States v. Urbanik*, 747 F.2d

246 (4th Cir. 1984).

Three jurors have testified unequivocally that Ms. Lentz's day planners were in the jury room and that the jury discussed the entries in each book. None of this information was admissible under any of the twenty-three exceptions to the hearsay rule. To the contrary, the Court had specifically excluded this evidence. That ruling was affirmed by the Fourth Circuit Court of Appeals.

This inadmissible evidence denied the Defendant his right to confrontation. There is absolutely no evidence whatsoever that Mr. Lentz was charged with abuse, arrested, prosecuted, or convicted of assault at any time in 1996. There was no evidence offered by the Government that Mr. Lentz was convicted of assaulting Ms. Lentz at any time. The admission of these day planner diaries allowed the jury to consider unproven crimes. This was a direct violation of Rule 404(b) of the Federal Rules of Evidence. Rule 404(b) precludes the offer of evidence of other crimes or other wrongs to show the character of the accused or to show that the accused has a propensity to commit a crime. Fed. R. Evid. 404(b).

The Government contends that the day planner evidence was cumulative of the types of evidence admitted at trial about Mr. and Ms. Lentz. The Court disagrees. The Court acknowledges that there was substantial evidence that the parties continued to argue over divorce property and visitation issues in April of 1996. Some of this type of evidence was admitted at trial to show the nature of the relationship between the parties, as well as the impending divorce proceeding. However, the Court's pretrial ruling and the

Court's ruling during trial excluding the brown day planner, clearly established that the day planners were not to be admitted because of Sixth Amendment concerns.

The day planner notations are insidious and make very serious allegations. The day planners contain handwritten statements by Ms. Lentz that offer her thoughts and notes. Ms. Lentz's day planners, offered as testimony, do not allow the Defendant to test the accuracy of the entries or notes, to assess her credibility, her demeanor, or her biases, if any, against him. The law does not allow this kind of hearsay evidence to be admitted in a trial because such statements may not be reliable, reflect bias, may not be accurate, and carry the risk of an improper conviction.

At the evidentiary hearing on the Defendant's Motion to Set Aside the Jury's Verdict, counsel for the Government argued that the Defendant's Motion amounted to "baloney."[17] At one point Government's counsel argued that the grounds for this Motion to Set Aside the Jury's Verdict were like "manna from heaven" for the defense.[18] Contrary to the Government's minimization of its conduct, there can be no doubt that Mr Mellin's introduction of the highly inflammatory and misleading information referred to in Ms. Lentz's day planners was a very serious matter. This is a capital case where life and death are literally at stake. This is hardly "baloney."

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[17] *See* Nov. 5, 2003 transcript of evidentiary hearing at 167.

[18] *See id* at 171.

In the end, the Court concludes that because the Government supplied tainted evidence to the jury that was never admitted into evidence, this evidence was considered by the jury, and influenced the jury's deliberation, Mr. Lentz's conviction cannot stand. The Court cannot sentence Mr. Lentz to life in prison where the jury has admittedly considered tainted evidence submitted by the Government, and where no remedial measures can be taken to correct the Government's error.

Justice compels that Mr. Lentz be afforded a new trial. There is no prejudice to the Government here. The Government has its witnesses and the issues are clear. In addition, a new trial will not be as lengthy or costly because this is now a non-capital case, and in a case like this, where the conviction for kidnapping resulting in death carries a mandatory life sentence, fairness dictates that the Defendant receive a new trial. An appropriate order will issue.

ENTERED this 29th day of JANUARY, 2004.

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
1/29/04